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In the

Supreme Court of the United States

October Term, 1961

MARTIN L. WAXMAN,
Appellant,
v.
COMMONWEALTH OF VIRGINIA,
Appellee.

LEONA CORRELL,
Appellant,
v.
COMMONWEALTH OF VIRGINIA,
Appellee.

ANGELO GIORDANO,
Appellant,
v.
COMMONWEALTH OF VIRGINIA,
Appellee.

JOSEPHINE SPENCE,
Appellant,
v.
COMMONWEALTH OF VIRGINIA,
Appellee.

Appeal from the Supreme Court of Appeals of Virginia

MOTION TO DISMISS

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STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS

The appellee files this motion to dismiss these appeals on two grounds, to-wit, first, that the appeals do not present a

substantial federal question and, secondly, that the judgments rest upon an adequate non-federal basis. The matters here relied upon are more particularly stated.

STATE STATUTE INVOLVED AND NATURE OF THE CASE

A.

The Statute

The appellants contend that Section 40-64, Code of Virginia (1950) as amended (more particularly paragraph 4 thereof) is unconstitutional. That statute reads as follows:

> "No person shall singly or in concert with others interfere or attempt to interfere with another in the exercise of his right to work or to enter upon the performance of any lawful vocation by the use of force, threats of violence or intimidation, or by the use of insulting or threatening language directed toward such person, to induce or attempt to induce him to quit his employment or refrain from seeking employment.
>
> "No person shall engage in picketing by force or violence, or picket alone or in concert with others in such manner as to obstruct or interfere with free ingress or egress to and from any premises, or obstruct or interfere with free use of public streets, sidewalks or other public ways.
>
> "When a strike or lockout is in progress, no person who is not, or immediately prior to the time of the commencement of any strike or lockout was not, a bona fide employee of the business or industry being picketed shall participate in any picketing or any picketing activity with respect to such strike or lockout.
>
> "Any person violating any of the provisions of this section shall be guilty of a misdemeanor, and punished accordingly.
>
> "Notwithstanding the punishments herein provided

any court of general equity jurisdiction may enjoin picketing prohibited by this section, and in addition thereto, may enjoin any picketing or interference with lawful picketing when necessary to prevent disorder, restrain coercion, protect life or property, or promote the general welfare."

B.

Statement of the Cases and Proceeding in the State Courts

1.

The facts in these four cases, which were tried together, are found in fourteen pages of testimony (R. 23 to 37). A strike was actually in progress on June 15, 1961, which was brought about by the failure of negotiations between the Kenrose Manufacturing Company and the International Ladies Garment Workers Union, the bargaining agent of the employees. The contract with the company had expired prior to the strike (R. 24). The appellants were not employees of the Kenrose Manufacturing Company on June 15, 1960, nor had any of them been bona fide employees of that business prior to the commencement of the strike on June 7, 1960. While the strike was in progress, a picket line was established at the entry of the company's plant in the city of Radford. There was a large number of people in this picket line. The condition was described by the Chief of Police, W. D. Lawton in this fashion (R. 30).

"Q. Was there a large number of people in the line?
"A. Quite a few."

As the employees were going into the plant, appellant Waxman endeavored to stop them by using provocative language, to-wit, "Go home, go home." We again quote from the testimony of Police Chief Lawton (R. 30, 31):

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"Q. On the 15th day of June, 1960, did you see Martie Waxman at the Kenrose plant?

"A. I did.

"Q. Where was he when you saw him?

"A. He was in the picket line at the east gate of the Kenrose Manufacturing Company.

"Q. What was he doing?

"A. Walking the line of picket.

"Q. Did any automobiles try to get through the line?

"A. Yes, sir.

"Q. Did Mr. Waxman do anything or make any motions or say anything to anyone in the cars?

"A. He did.

"Q. Describe to the Court what activities he engaged in?

"A. He would stop; they would move back, and Mr. Waxman would say, 'Go home, go home.'

"Q. Did he make any motions or anything?

"A. Yes, sir; with his hand.

"Q. This was right at the entrance to the plant?

"A. That's correct.

"Q. And while the pickets were there?

"A. Yes, sir.

"Q. And the employees were going and coming?

"A. Yes, sir.

* * *

"Q. Did Mr. Waxman seem to be directing the activities of the strikers?

"Mr. Goldsmith: Your Honor, I object to the form of the question. He can ask him what Mr. Waxman did.

"MR. SPIERS: Who seemed to be in charge of the picket line?

"A. To me they all seemed to be in charge of it."

The other three appellants were marching in the picket line (R. 33). Other than what Waxman said, the evidence fails to disclose that these defendants sought to communicate any information to anybody at that time.

II.

On June 27, 1960, the appellants were found guilty of a violation of Section 40-64 of the Code of Virginia (1950), as amended, by the Municipal Court of the City of Radford, Virginia.

III.

On December 10, 1960, the appellants were found guilty of said aforesaid section of the Virginia Code by the Circuit Court of the City of Radford, Virginia.

IV.

On January 15, 1962, the Supreme Court of Appeals of Virginia affirmed the judgments of conviction in these cases. The opinion of the Court is reported in 203 Va. at 257, 123 S. E. (2d) 361. Petitions for rehearing were denied by said Court on March 5, 1962.

C.

Questions Presented

I.

Is Section 40-64 of the Code of Virginia (1950) as amended repugnant to the Fourteenth Amendment to the Constitution of the United States?

II.

Did the enactment by Congress of the National Labor Relations Act (62 Stat. 136, 29 U.S.C., Section 151, et seq.) preempt the States of jurisdiction to exercise the police power in the manner provided for in Section 40-64, Code of Virginia (1950) as amended?

ARGUMENT

A.

Preliminary Statement

It should be borne in mind just what these cases are. They involve no rights between employer and employee. In the initial stages of the trials, this was made clear by the Judge of the Municipal Court of Radford (R. 23):

> "We are not here to try the merits of the strike between Kenrose and the union. The Court is only going to hear evidence directly related to the charges as set forth in these respective warrants. Any other evidence will be inadmissible and not allowed by this Court. And I want that clearly understood before we start."

The State of Virginia is simply exercising her traditional rights and responsibilities and preservng the peace and order by prosecutng and punishing these appellants. No attempt here was made to prohibit all picketing, as was done in the case of *Thornhill* v. *Alabama*, 310 U. S. 88. In fact, our Supreme Court of Appeals has recognized that peaceful picketing by persons who are not bona fide employees is lawful, and it struck down as invalid a portion of Section 40-64 of the Code of Virginia before it was amended to include the present language in paragraph 3 thereof. *Edwards* v. *Commonwealth*, 191 Va. 272, 60 S. E. (2d) 916. In that case, the accused persons picketed a motion picture theatre.

There was no labor dispute and there was no strike in progress at that time. That portion of the statute, 40-64, under which the defendants were convicted reads as follows:

> "It shall be unlawful for any person who is not, or immediately prior to the commencement of any strike was not a bona fide employee of the business or industry being picketed, to participate in any picketing or any picketing activity with respect to such strike or such business or industry."

Justice Buchanan, after reviewing the pertinent federal cases, speaking for the Court, stated:

> "Under that part of the statute we are considering the sole criterion of the right to picket is whether the picketer is a *bona fide* employee of the business or industry being picketed. Like the statute in the *Thornhill Case* and the ordinance in the *Carlson Case*, it leaves no room for exception based upon the number of persons engaged in picketing, the peaceful character of the picketing, the nature of the dispute or controversy, or the truthfulness of what is said or written. It could be applied to make it a crime for any person not employed by a business or industry to publish, by word or sign, his opinion as to the morality, the decency or the danger of what is being done by or said within any business or industry; *e. g.*, to picket or participate in picketing the showing of a moving picture considered by the picketer to be corruptive of good morals. Illustrations could be multiplied.
>
> "In that respect the statute here, like that in the *Thornhill Case*, but unlike the injunctions sustained in the other cases referred to, does not aim specifically and exclusively at evils within the allowable area of State control, but includes in its broad sweep other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. As said of the

> statute in the *Thornhill Case*, it readily lends itself to harsh or discriminatory enforcement and 'an accused, after arrest and conviction under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him' . . . (Authorities cited).
>
> "For the reasons stated we hold that that part of section 3 of the act which makes it unlawful for any person who is not a *bona fide* employee of the business or industry being picketed to participate in any picketing or any picketing activity with respect to such business or industry is invalid, and the conviction of these defendants thereunder cannot be sustained. No other part of the act is here in question and we express no opinion upon the validity of any other provision of the act."

After the decision in the *Edwards* case, the General Assembly of Virginia amended and reenacted Section 40-64 by inserting the present language in paragraph 3 thereof. (Chapter 674 of the Acts of the General Assembly of 1952) The effect of this amendment was to limit picketing to bona fide employees while a strike or lockout was in progress; that is to say, anyone not a bona fide employee is prohibited from picketing *during a strike* or lockout. The question of the validity of the amended statute was squarely before the Virginia Supreme Court of Appeals in the case of *Daugherty* v. *Commonwealth*, 199 Va. 515, 100 S. E. (2d) 754 (December, 1957) resulting in the affirmation of a judgment of the conviction. No attempt was made to appeal therefrom to this Honorable Court. The appellants here are non-residents of Virginia and joined the picket line while the strike was in progress apparently knowing full well that the activity was in violation of the laws of Virginia. According to the evidence, the appellants were employees of a

union and Waxman appeared to be the educational director of said union. They assert before this Honorable Court that the object of the strike was lawful, to-wit, securing and safeguarding of wages, hours and conditions of employees of Kenrose. This may be true; however, the *motive* of these appellants in joining the pickets was apparently to prevent those persons desiring to work at the Kenrose plant from working there. The evidence fails to disclose whether the persons whom Waxman commanded to "Go home, go home" were members or non-members of the union.

The other appellants were in concert with Waxman, they being employees of the same union and sent there for the same purpose; hence all of them should be treated together.

B.

The Virginia Statute Is Not Repugnant To the Fourteenth Amendment To the Federal Constitution

The premise that a State may not bar picketing emanates from the doctrine set forth in *Thornhill v. Alabama*, *supra*, that such would violate the constitutional provisions guaranteeing freedom of speech and assembly. If this position be correct, then the States would have no power or authority to limit picketing in any manner, not only by federal constitutional provisions but by State law, all the States guarantee freedom of speech. (Article 12 of the Virginia Constitution)

Of course, picketing is much more than freedom of speech. That term means the dissemination of ideas through words, oral or written. The establishment of a picket line is a means of intimidation and carries with it the implication of a reserve force for use, if deemed necessary.

The language of the Supreme Court of Massachusetts in the case of *Saveall* v. *Demers*, 322 Mass. 70, 76 N. E.

(2d) 12, 14, 2 A.L.R. (2d) 1190, is appropriate for consideration in this connection:

> "If picketing is speech it is certainly also much more. However peacefully it may be carried on, it possesses elements of compulsion upon the person picketed which bear little relation to the communication to any one or information or of ideas. And resort is commonly had to it precisely because of these elements, which, much more than any force of argument contained in it, give it the power it possesses. * * *"

For a comprehensive article on "Picketing and Free Speech," by Mr. Ludwig Teller, see 56 Harvard Law Review, page 180.

Picketing is a physical activity in the nature of a parade more than the exercise of freedom of speech. There is no freedom of discussion while picketing is in progress. It cannot be denied that picketing is a form of economic pressure. This Honorable Court has held that a State statute prohibiting unlicensed parades and processions is valid. *Cox* v. *State of New Hampshire*, 312 U. S. 569. The same reasoning could be applied here. Why then could not a State limit picketing during a strike to those persons primarily interested, to-wit, employees. This would be a means of preventing the eruption of violence before it began.

Appellants concede that the sweeping pronouncements made in *Thornhill* v. *Alabama, supra*, have been limited by later decisions. (Appellants' brief, page 14). In this we heartily concur.

In the case of *Carpenter and Joiners Union, Etc.* v. *Ritter's Cafe*, 315 U. S. 722, 62 S. Ct. 807, 86 L. Ed. 1143, Mr. Justice Frankfurter, in delivering the opinion of the Court, stated:

"It is true that by peaceful picketing workingmen communicate their grievances. As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of the constitutional right of free utterance. *But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute.* Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this line is to write into the Constitution the notion that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing. Such a view of the Due Process Clause would compel the states to allow the disputants in a particular industrial episode to *conscript neutrals* having no relation to either the dispute or the industry in which it arose." (Italics supplied.)

In the case of *International Brotherhood of Teamsters, etc.* v. *Hanke*, 339 U. S. 470, 70 S. Ct. 773, 94 L. Ed. 995, decided May 8, 1950, the Court, in sustaining the validity of an injunction to prohibit the picketing of a business conducted by the owner himself, without employees, in order to compel him to convert to union shop, stated:

"... it cannot dogmatically be equated with the constitutionally protected freedom of speech. Our decisions reflect recognition that picketing is 'indeed a hybrid.' * * * The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and 'the power of the State to set the limits of permissible contest open to industrial combatants.'"

In the case of *Hughes* v. *Superior Court*, 339 U. S. 460, 70 S. Ct. 718, 94 L. Ed. 985, decided May 8, 1950, the Court stated:

> "However general or loose the language of opinions, the specific situations have controlled decision. It has been amply recognized that picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance. * * * Picketing when not in numbers that of themselves carry a threat of violence may be a lawful means to a lawful end."

From these authorities it can be said that picketing is not an absolute right, and indeed it has its limitations. It is for the local government to prescribe those limitations so as to properly police labor strikes and labor controversies which may erupt into violence. This is just what Virginia has done by enacting this statute, limiting the right to picket to employees or immediate past employees while a strike is in progress.

C.

Police Power of State Not To Be Impaired

On page 12 of the appellants' brief we find this language:

> "Nor can the Virginia statute limiting picketing to employees be sustained, as the court below sought to do, 'as a measure to prevent violence' (*infra*, pp. App. 22, 19-20). There simply is no rational basis for the court's assumption (*id.*), plucked out of thin air, that 'to permit union representatives to picket would bring about massed picket lines, force and violence."

Justice Whittle, speaking for the Court in the case of *Daugherty* v. *Commonwealth*, *supra*, stated:

"Applying the clear ruling in the *Vogt* [354 U. S. 284] case to the cases before us, we find no constitutional inhibition to a state enacting a law prohibiting strangers from entering the picket line when a strike or lockout is in progress. When we consider paragraph 3, here involved, in context with the other provisions of §40-64, the prohibition contained therein has a tendency to place a reasonable limitation on the number of persons engaged in picketing and is thus a peace and order measure. If the defendants in the instant cases be allowed to freely join the picket line then other strangers to the controversy would have the same right and numbers could thus be added with sufficient strength to turn peaceful picketing into picketing by force with its accompanying coercion and power. The limitation placed upon picketing to those directly involved in the issue causing it, has a direct relation to the prevention of disorder and coercion.

"As we said in the *Edwards* case, *supra*, (191 Va., at p. 285), the State may regulate picketing if such regulation has 'a reasonable basis in prevention of disorder, restraint of coercion, protection of life or property, or promotion of the general welfare.'

"Another plausible purpose of the act, beyond the preservation of peace and order, is to express a policy of the State that when a situation gets to the point of a strike or lockout, both the employer and the employees should be left free to resolve their differences without pressure from outside influences.

"It cannot be doubted that paragraph 3 of §40-64, as amended, embraces an avowed public policy of the State. The General Assembly was unwilling to abandon such policy after our decision in the *Edwards* case and immediately reenacted the statute in an attempt to correct its defects. Here the State, through its legislature, clearly 'designed a remedy to meet a specific situation or to accomplish a particular social policy', and, as stated in the majority opinions in the *Vogt* case, 'These cases [those decided by the Supreme Court]

made manifest that picketing, even though 'peaceful', involved more than just communication of ideas and could not be immune from all State regulation. 'Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated.'

"We are therefore of the opinion that the paragraph in question (par. 3, §40-64) is not violative of either the State or Federal Constitution."

The assertions and constructions reached by Justice Whittle are both sound and reasonable. By limiting the participants in a strike accompanied by picketing to those who are employees or immediate past employees, the police authorities can control such activities and prevent a peaceful picket line from becoming an unruly or violent one. The approximate number of employees is ascertainable and the police authority can readily determine the number of police necessary to control the situation, whereas if one outsider is permitted, then any number would have the same right. Mass picketing would result in violent picketing and rioting. The number of persons participating would become too great for the normal police force to control. A State would be derelict in its duty not to provide legislation to police and control such activities. When should this power to police begin? Is it necessary for a State to wait until picketing becomes so unruly that it is impossible to stop violence? Cannot a State take steps to prevent violence before it commences? Cannot the hand which seeks to light the fuse be stayed before actual illumination ensues? The constitutional validity of a statute enacted under the police power is always presumed. The mere naked assertion that there is no rational basis therefor and the reasonings of

the highest court in the State interpreting the same is "plucked out of thin air" is not enough to warrant this Honorable Court in declaring such a statute void. We can perceive of no reason to hold that any class of individuals, including the members of a labor union, are immune from prosecution of such a statute. This Honorable Court has held that even peaceful picketing can be regulated. The extent of control is to be determined by legislative enactment.

The National Labor Relations Act makes no provision to police activities attendant to labor strikes. This was recognized by this Court in the case of *Allen-Bradley v. Wisconsin E. Rel. Board*, 315 U. S. 746, 86 L. Ed. 1154, decided March 30, 1942, unanimous opinion by Mr. Justice Douglas. In the course of that decision, the Court stated:

> "The only employee or union conduct and activity forbidden by the state Board in this case was mass picketing, threatening employees desiring to work with physical injury or property damage, obstructing entrance to and egress from the company's factory, obstructing the streets and public roads surrounding the factory, and picketing the homes of employees. So far as the fourteen individuals are concerned, their status as employees of the company was not affected.
>
> "We agree with the statement of the United States as amicus curiae that the federal Act was not designed to preclude a State from enacting legislation limited to the prohibition or regulation of this type of employee or union activity. The Committee Reports on the federal Act plainly indicate that it is not 'a mere police court measure' and that *authority of the several States may be exerted to control such conduct.* Furthermore, this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.' (Citing Authorities). Congress has not made such employee and

> union conduct as is involved in this case subject to regulation by the federal Board. * * * We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard. . . . But, as we have said, the federal Act does not govern employee or union activity of the type here enjoined. And we fail to see how the inability to utilize mass picketing, threats violence, and the other devices which were here employed impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal Act. * * *" (Italics supplied.)

This Honorable Court has always recognized the doctrine that the intention of Congress must be clearly manifested to exclude the States from exercising their police power. In the case of *International Union* v. *Wisconsin Employees Relations Board* (1948), 336 U. S. 245, 93 L. Ed. 651, the Court reaffirmed the doctrine that the intention of Congress to exclude the States from exercising their police power must be clearly manifested, citing the case of *Allen-Bradley, etc.* v. *Wisconsin, supra.* The Court concluded its opinion by stating:

> "We find no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate a course of conduct neither made a right under federal law nor a violation of it and which has the coercive effect obvious in their device."

The language of the Court in the case of *Schwartz* v. *Texas* (1952), 344 U. S. 199, 97 L. Ed. 233, clearly enunciates this important principle:

> "If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the

exercise of the power of the State unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not likely to be presumed."

This Honorable Court was of the opinion in 1942, expressed in the case of *Allen-Bradley v. Wisconsin, supra,* that Congress never intended that the National Relations Labor Act be a police measure and this act did not clearly manifest that it was the intention of Congress to exclude the States from exercising their police power in this field. Has this act been amended since that time (1942) to make it manifestly clear that Congress intended to divest the States of their police power in controlling or preventing violence occasioned by a labor dispute? If the National Labor Relations Act has been so amended, counsel has not been able to find such an amendment. Neither has any such amendment been referred to by this Honorable Court in the many cases it has decided since that time (1942). We submit that a careful consideration of the statute and of the Court's opinion in the *Daugherty* case, *supra,* leads to the conclusion that the enforcement of this statute is a valid exercise of police power on the part of the State and not repugnant to the United States Constitution.

FEDERAL STATUTE DID NOT PREEMPT THE STATE OF VIRGINIA FROM EXERCISING POLICE POWER

I.

The Federal Statute Affords These Appellants No Right to Violate State Law

The pertinent provisions of the National Labor Relations Act designated here as sections in the United States Code annotated are as follows:

"§ 157. Right of employees as to organization, collective bargaining, etc.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 140."

"§ 152. Definitions.

* * *

"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

"§ 163. Right to strike preserved.

"Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the

right to strike, or to *affect the limitations or qualifications on that right.* July 5, 1935, c. 372, § 13, 49 Stat. 457; June 23, 1947, 3:17 p.m., E.D.T., c. 120, Title I, § 101, 61 Stat. 151." (Italics supplied.).

Appellants maintain that their rights are protected by Sections 157 and 163, *supra.* In the first place, non-employees are not mentioned in Section 157, and picketing is not mentioned in Section 163. The Virginia statute does not prevent employees from exercising their rights under Section 157 by denying appellants (non-employees) the privilege of participating in picketing activities. The Virginia employees are intelligent and able to assert their rights under this act without assistance from outsiders in the picket line. The employee is the person who strikes. He ceases work any time he cares to do so for reasons sufficient unto himself. How could an employee strike through another? Furthermore, the Virginia act does not prevent employees from striking.

Nothing in this act grants a non-employee union member a right "to engage in concerted activities (picketing-strikes) for the purpose of collective bargaining, etc." That right is granted the employee as defined in the statute. Had Congress intended that non-employee union members be granted that privilege, the statute would have so provided. What the defendants desire here is that the Court read into the statute language to that effect.

The argument made by the defendants that the Kenrose employees are deprived of their rights "to bargain collectively through representatives of their own choosing" because the defendants are deprived of picketing and participating in the strike is fallacious. Defendants, at the time of their arrest, were not negotiating or bargaining with the Kenrose Company. They were endeavoring to prevent

employees of that company who desired to work from entering the plant by commanding that they "go home, go home". The defendants were not deprived of negotiating with the Kenrose Company. That they had apparently done without success. The record is silent as to the purpose of the strike whether it was lawful or unlawful. From what is stated in the meager testimony, it can be logically inferred that there was a contract with the employees before the strike began, and efforts to renew the contract had failed.

The defendants' arrest did not deter them from further bargaining with the company as representatives of the employees. The statute does not provide that the employees may strike through their representatives. The bona fide company employees were not prevented from striking and picketing the Kenrose plant.

It is noted that Section 163 of the United States Code Annotated, *supra*, preserves the right to strike, but that section specifically states that the act should not be construed "to affect the limitations or qualifications on that right". Obviously, what Congress meant was that the States and local governments could place limitations on the right to strike, and the picketing attendant thereto. Such limitations would naturally be where the strike and picketing could take place, the number of persons permitted to gather to participate in such picketing and just who are entitled to participate. We would have to look no further than the language of this provision of the statute to conclude that a State could police activities surrounding a strike prohibiting mass picketing and denying the right to participate in a strike to those who are bona fide employees of the business concern.

Therefore, it can be asserted that Congress has not seen fit to amend the National Labor Relations Act so as to

preclude the States from policing activities surrounding a labor dispute. This being the situation, the States are free to prescribe the necessary limitations so as to control the situation into becoming violent. Virginia has done this by prohibiting those persons who are non-employees from participating in picketing while a strike is in progress.

II.

Recent Cases Distinguished

The appellants strongly rely on the case of *San Diego Building Trades Council* v. *Gorman*, 359 U. S. 236, as authority to divest the State of Virginia from enacting a police measure such as set forth in paragraph 3 of Section 40-64, Code of Virginia (1950) as amended. This Court has aptly stated in the case of *Hughes* v. *Superior Court*, *supra*, at 460:

> "However general or loose the language of opinions, the specific situations have controlled decision."

The *Gorman* case and the cases at bar are entirely different and can be readily distinguished. That case was twice before this Court, the last decision being rendered on April 20, 1959. The Supreme Court of California enjoined a union from picketing because the conduct of the union constituted *unfair practices* under the Federal act and awarded damages. The Union had sought from the owners of the company an agreement to retain in the owners' employ only those workers who were already members of the union or who applied for membership within thirty days. The owners refused and sought relief before the Federal Labor Relations Board. That board refused to entertain the case on the ground that according to its

policy there was not sufficient business in interstate commerce to justify the same. Therefore, the owners sought relief in the California courts which resulted in an injunction against the union and judgment for damages amounting to $1,000.00. There was no evidence of any violence in connection with the picketing. On March 25, 1957, the Supreme Court vacated the judgment insofar as injunctive relief was concerned, basing its reason on the view announced in the cases of *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1, 1 L. Ed. (2d) 601, 77 S. Ct. 598, 609, and *Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 427, AFL, et al., Petitioners* v. *Fairlawn Meats, Inc.*, 353 U. S. 20, 1 L. Ed. (2d) 613, 77 S. Ct. 604, *reh den* 353 U. S. 948, 1 L. Ed. (2d) 857, 77 S. Ct. 822 (No. 41). In those cases, jurisdiction was denied the State courts to deal with the issues involved because the same were within the jurisdiction of the National Labor Relations Board, notwithstanding the fact that the board had declined to exercise its jurisdiction. In the *Amalgamated Meat Cutters* case, the Ohio court had enjoined the union from vacating the employer from trespassing upon his premises and exercising secondary pressure on its suppliers. In the *Guss* case, a labor union filed charges of violations of Section 8 of the National Labor Relations Act with the National Labor Relations Board, alleging unfair labor practices. The board declined to consider the charges. Thereafter, the union filed substantially the same charges with the Utah Labor Relations Board according to the Utah Labor Relations Act. The State Board granted relief. The Supreme Court of the United States held that the State had no power to deal with such matters, as the same were within the jurisdiction of the National Labor Relations Board. In vacating the judgment of the Supreme

Court of California, this Court remanded the case so that court could determine whether it was proper that the judgment for damages should be suspended; that is to say, whether there were any grounds under the California law for such damages. The California Supreme Court held that the damages were proper, as they resulted in the tortious actions of the union which were in violation of Section 158 of the National Labor Relations Act. This Court in the second *Gorman* case, *supra*, considered whether or not damages could be allowed against the union in the absence of violence. The conclusion reached by the Court in that case was that the matter in controversy was encompassed in the National Labor Relations Act and, therefore, the State Court had no jurisdiction. Mr. Justice Frankfurter, in delivering the opinion of the Court stated:

> "In light of these principles the case before us is clear. Since the National Labor Relations Board has not adjudicated the status of the conduct for which the State of California seeks to give a remedy in damages, and since such activity is arguably within the compass of Section 7 and Section 8 of the Act, the State jurisdiction is displaced."

In the case at bar, there is no attempt to give relief to the company or pass upon questions that are properly cognizable under the National Labor Relations Act. As pointed out by Mr. Justice Whittle, the third paragraph of Section 40-64 is a police measure and designed primarily for the prevention of disorder and coercion. The National Labor Relations Act makes no provision for the policing of strikes and picketing. It has been long recognized by this Court that the said act in no way limits the States or prohibits the States from carrying out their duty in preserving good

order within their domains. In the *Gorman* case, the Court recognizes this by stating:

> "It is true that we have allowed the States to grant compensation for consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. (Authorities cited). State jurisdiction has prevailed in those situations because the compelling State interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed Congressional direction."

It is interesting to note that in the annotation made of the *Gorman* case, *supra*, on page 1933 of Volume 3 L. Ed. (2d), we find this language:

> "Note that the opinion of a majority of the justices was careful to acknowledge that it has allowed states to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. It follows that the decision is not to be taken as depriving the states of their jurisdiction to award damages for picketing which involves violence and imminent threats to the public order."

The conclusion is inescapably that there is nothing in the *Gorman* case which would prevent a State from prohibiting non-employees from participating in picketing where a strike is in progress. Another thing to consider is that in all of these cases that have been before this Court relative to this subject have been cases where all persons participating in the picketing have been enjoined, employees, unions, non-employees, as the case may be, which has resulted in the cessation of all activities and hence the strike

and all picketing, whether by employees or non-employees, have been terminated. In the case at bar, however, no attempt was made to prohibit bona fide employees from exercising their right to strike and their right to picket. The only persons who have been prevented from participating in the picketing are non-employees who apparently engaged in the picketing for the express purpose of stirring up trouble. In fact, the actions of Waxman in demanding that persons crossing the picket line go home could very well incite trouble which would lead to violence. If these four non-employees had the right to picket, any unlimited number of non-employees would have the same right, and their presence on the scene could very well bring about a situation that would lead to violence which the police could not control.

On page 13 of Appellants' brief, they assert that the decision of the Virginia Supreme Court of Appeals in these cases "flies directly in the fact of the entire group of preemption decisions of this Court from *Garner* v. *Teamsters Union*, 346 U. S. 485 . . .".

In the *Garner* case, the employer had obtained an injunction in a lower court against the union because the union was guilty of unfair labor practices. The Pennsylvania law parallels the National Labor Relations Act. The Supreme Court of Pennsylvania held that the State statute was invalid. This Honorable Court affirmed the action of the Pennsylvania Supreme Court as it was a clear case where the doctrine of preemption would apply. The Court pointed out that the employer could secure relief under the federal statute. As heretofore indicated, Congress has not amended the federal act to police activities growing out of labor disputes. There would be no way in which Virginia could secure relief before the National Labor Relations

Board to prevent peaceful picketing from erupting into violent picketing. The other cases cited on page 13 are very similar to the *Gorman* case. In most of these cases, this Court did not issue formal opinions.

In the case of *Ex Parte Pierce* (Texas), 242 S.W. (2d) 424, certiorari was denied by the Supreme Court of the United States on May 22, 1961. Pierce and others had been enjoined from unlawfully obstructing the free ingress and egress of vehicles and persons from the premises of the struck Company; also from unlawfully obstructing traffic, etc. Pierce and another were held in contempt by the trial court. They contended that the State court had no jurisdiction as the employer's business affects interstate commerce and, therefore, the subject matter of the strike and picketing is preempted by the National Labor Relations Board by certain sections of the Taft-Hartley law. There was nothing in the evidence to indicate that the strike was for an unlawful purpose or that there was any violence prior to the issuance of the injunction. The Supreme Court of Texas held that the trial court was not preempted from jurisdiction, basing its decision on the case of *Youngdale v. Rainfair*, 355 U. S. 131, 2 L. Ed. (2d) 151, 71 S. Ct. 206, and other federal cases.

We feel that this case is similar to the cases at bar and indicates that this Honorable Court has not held that the policing by the States of such activities has been preempted by the National Labor Relations Act.

In the case of *General Drivers Allied Automotive Union No. 498 v. Hidgins*, 188 Kansas, 11 360 Pac. Rep. (2d) 456, the appellate court held that the "right to work" amendment to the State Constitution prohibits the making of agency shop agreements. The Supreme Court of Kansas upheld the validity of the provisions of the State Consti-

tution. The union contended that the State Constitutional Amendment was invalidated under the supremacy clause of the Federal Constitution and that under the doctrine of preemption the State was ousted of jurisdiction as the National Labor Relations Board had exclusive jurisdiction to determine the legality of the agency shop clause. The petitioner contended that the *Gorman* case, *supra*, was controlling. This Honorable Court, on October 9, 1961, denied certiorari, 82 S. Ct. 51, 7 L. Ed. (2d) 32. The situation in that case differed from the case at bar, but we believe that it is indicative of the fact that this Honorable Court does not construe the *Gorman* case as all inclusive and that the States still have the authority in enforcing their statutes relative to the regulations and policing of labor disputes.

The Fourteenth Amendment certainly does not prohibit States from policing within their boundaries. There is nothing holy or sacred about a strike or picketing. They are weapons used by the employees to gain their objectives. The use of such weapons is a proper subject of control by public authority. If the United States government desires that such activities be not policed or limited in their magnitude by State governments, then let congress place unequivocal language in the statutes that can be understood by the people. It is for the legislative branch of the government, both State and National, to determine what courses should be followed to cope with this problem.

CONCLUSION

From what has been heretofore stated, these cases do not present any substantial federal question which has not already been passed upon by this Honorable Court; and the judgments in these cases rest upon adequate non-federal basis, namely, the action of the Supreme Court of Appeals

in interpreting the provisions of the Virginia statute and the Virginia Constitution, which statute is designed to prevent the disorders occasioned by a labor dispute. The appellee therefore respectfully moves this Honorable Court to dismiss these appeals, or in the alternative, to affirm the judgments of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Statement Opposing Jurisdiction and Motion to Dismiss to Morris P. Glushien, Esq. and Max Zimmy, Esq., 1710 Broadway, New York 19, New York, and to John M. Goldsmith, Esq. and Robert S. Irons, Esq., Goldsmith Building, Radford, Virginia, Counsel of Record for the appellants, by depositing the same in a United States post office mail box, with first class postage prepaid, addressed to said Counsel of Record for the Appellees, at their post office addresses hereinabove set forth, on this the 10th day of August, 1962.

D. GARDINER TYLER

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